

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SAMUEL W. HOWARD,

Plaintiff,

v.

CAROLYN COLVIN, Acting
Commissioner of Social Security,

Defendant.

No.: 4:15-CV-5040-EFS

**ORDER DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT AND GRANTING
DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT**

Before the Court are cross-summary-judgment motions. ECF Nos. 13 & 15. Plaintiff Samuel Howard appeals the Administrative Law Judge's (ALJ) denial of benefits. ECF No. 13. Mr. Howard contends the ALJ erred because he 1) improperly rejected the opinions of Mr. Howard's medical care provider; 2) failed to find that Mr. Howard suffered from the severe impairments of diverticulitis/abdominal pain, chronic obstructive pulmonary disease (COPD), and sleep apnea; 3) improperly found Mr. Howard's subjective complaints regarding the intensity, persistence, and limiting effects of his impairments less than credible; and 4) failed to properly identify specific jobs, available in significant numbers in the national economy, which Mr. Howard could perform given his impairments. ECF No. 13 at 2. The Commissioner of Social Security ("Commissioner") asks the Court to affirm the ALJ's decision that Mr. Howard is capable of performing substantial gainful activity in a field for which a

1 significant number of jobs exist in the national economy. ECF No. 15 at
2 1. After reviewing the record and relevant authority, the Court is fully
3 informed. For the reasons set forth below, the Court grants Defendant's
4 Motion for Summary Judgment and denies Plaintiff's Motion for Summary
5 Judgment.

6 **A. Statement of Facts¹**

7
8 Mr. Howard was born in 1961. Transcript of admin. hrg. ("Tr.") at
9 156. He has a limited education having only completed the ninth grade
10 before obtaining his GED. Tr. at 558. Mr. Howard has been diagnosed with
11 hepatitis C and alleges a number of physical disabilities including
12 anxiety, depression, bipolar disorder, chronic fatigue, bad knees,
13 shoulder problems, and left arm problems. ECF No. 4; Tr. 821 & 979. He
14 cannot take pain medication because of his hepatitis C but has received
15 approximately 10 injections to help with his knee pain. Tr. at 549 &
16 552-61. Mr. Howard spends his days watching TV and occasionally taking
17 his dogs for a walk. Tr. at 553-55.

18
19 According to Mr. Howard's own testimony, he experiences
20 significant pain in his back, knees, and neck that prevent him from
21 working or doing any physical activity. Tr. at 548-50. His average pain
22 level is around a six or seven but will occasionally spike to ten
23 resulting in trips to the emergency room. Tr. at 560.

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26
27 ¹ The facts are only briefly summarized. Detailed facts are
28 contained in the administrative hearing transcript, the ALJ's decision,
the parties' briefs, and the underlying records.

1 Mr. Howard has a very limited employment history. Tr. at 548. He
2 worked as a house painter until approximately 2007. *Id.* This is the only
3 job he has had in the last 15 years. *Id.*

4 **B. Procedural History**

5 On August 6, 2008, Mr. Howard protectively applied for
6 supplemental security income alleging a number of physical disabilities.
7 Tr. at 156-62. His alleged onset date was July 16, 2008. *Id.* Mr.
8 Howard's claim was denied initially and upon reconsideration on February
9 20, 2009. Tr. at 11. Mr. Howard filed a written request for an
10 administrative hearing, which was held before ALJ R. J. Payne on August
11 2, 2010. *Id.* On August 27, 2010, ALJ Payne denied Mr. Howard's claim
12 finding that he was not disabled under the Social Security Act. Tr. at
13 19. The Appeals Council denied review of the ALJ's decision. Tr. at 1-4.
14 Mr. Howard then appealed the decision to the U.S. District Court for the
15 Eastern District of Washington, which remanded the case for further
16 proceedings. ECF No. 590-605. Mr. Howard then amended his alleged onset
17 date to September 12, 2011. Tr. at 532.

18
19 On August 4, 2014, consistent with the District Court's decision,
20 ALJ Payne held another administrative hearing to reevaluate whether Mr.
21 Howard is disabled under the Social Security Act. Tr. at 457. Mr. Howard
22 was present and testified at the hearing and was represented by counsel.
23 *Id.* Dr. Darius Gahzi, M.D., and Dr. Nancy Winfrey, Ph.D., impartial
24 medical experts, also testified at the hearing. *Id.* The hearing was
25 continued to January 9, 2015, to allow the testimony of Dr. Robert
26 Thomson, M.D., another medical expert. The hearing was continued a
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28

1 second time to January 15, 2015, to allow for the testimony of
2 Vocational Expert (VE) Daniel McKinney. *Id.*

3 On February 9, 2015, ALJ Payne issued his decision. The ALJ
4 determined that Mr. Howard has the following severe impairments:
5 bilateral knee tendinitis/osteoarthritis; left shoulder tendinitis;
6 degenerative disc changes in the cervical, thoracic, and lumbar spine;
7 hepatitis C; obesity; bipolar disorder II; and a history of
8 polysubstance abuse. Tr. at 459-60. The ALJ proceeded to find that Mr.
9 Howard's impairments do not meet or medically equal the severity of any
10 listed impairments. Tr. at 461. Despite Mr. Howard's impairments, the
11 ALJ ultimately found that Mr. Howard:
12

13 has the residual functional capacity to perform light work
14 as defined in 20 CFR 416.967(b) except he could sit, stand
15 and/or walk up to two hours for each at a time and six
16 hours total for each in an eight-hour day with normal
17 breaks; he could occasionally crouch, kneel, and climb
18 ramps, stairs, ladders, ropes, or scaffolds, but could
19 never crawl; he could tolerate occasional exposure to
20 unprotected heights; he could perform one to two step work
21 instructions; he would perform better with visual
22 instructions versus verbal instruction but could still
23 accomplish one to two-step work tasks with verbal
24 instructions only; he should have no interaction with
25 children, but he could interact appropriately with most of
26 the general public; he would do best with occasional
27 supervision (no "over-the-shoulder" type of supervision);
28 and he would be able to remain reasonably attentive and
responsive in a work setting and could carry out normal
work assignments satisfactorily despite and side effects
from his medications.

Tr. at 463.

Based on this assessment, which was presented to the vocational
expert, and based on Mr. Howard's age, education, work experience, and
residual functional capacity, the ALJ concluded Mr. Howard can perform
jobs that exist in significant numbers in the national economy, such as

1 Product Assembler, Electronics Worker, and Packing Line Worker, and is
2 not disabled as defined by the Social Security Act. Tr. at 470.

3 On May 11, 2015, Mr. Howard filed this lawsuit appealing the ALJ's
4 decision. ECF No. 1. The parties then filed the instant summary-judgment
5 motions. ECF Nos. 13 & 15.

6 **C. Disability Determination**

7 A "disability" is defined as the "inability to engage in any
8 substantial gainful activity by reason of any medically determinable
9 physical or mental impairment which can be expected to result in death
10 or which has lasted or can be expected to last for a continuous period
11 of not less than twelve months." 42 U.S.C. §§ 423(d)(1)(A),
12 1382c(a)(3)(A) The decision-maker uses a five-step sequential evaluation
13 process to determine whether a claimant is disabled. 20 C.F.R. §§
14 404.1520, 416.920.
15

16 Step one assesses whether the claimant is engaged in substantial
17 gainful activities during the relevant period. If he is, benefits are
18 denied. 20 C.F.R. §§ 404.1520(b), 416.920(b). If he is not, the
19 decision-maker proceeds to step two.
20

21 Step two assesses whether the claimant has a medically severe
22 impairment or combination of impairments. 20 C.F.R. §§ 404.1520(c),
23 416.920(c). If the claimant does not have a severe impairment or
24 combination of impairments, the disability claim is denied. If the
25 impairment is severe, the evaluation proceeds to the third step.

26 Step three compares the claimant's impairment with a number of
27 listed impairments acknowledged by the Commissioner to be so severe as
28 to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(d), 404

1 Subpt. P App. 1, 416.920(d). If the impairment meets or equals one of
2 the listed impairments, the claimant is conclusively presumed to be
3 disabled. If the impairment does not meet or equal one of the listed
4 impairments, the evaluation proceeds to the fourth step.

5 Step four assesses whether the impairment prevents the claimant
6 from performing work he has performed in the past. This includes
7 determining the claimant's residual functional capacity. 20 C.F.R. §§
8 404.1520(e), 416.920(e). If the claimant is able to perform his previous
9 work, he is not disabled. If the claimant cannot perform this work, the
10 evaluation proceeds to the fifth step.
11

12 Step five, the final step, assesses whether the claimant can
13 perform other work in the national economy in view of his age,
14 education, and work experience. 20 C.F.R. §§ 404.1520(f), 416.920(f);
15 see *Bowen v. Yuckert*, 482 U.S. 137 (1987).
16

17 The burden of proof shifts during this sequential disability
18 analysis. The claimant has the initial burden of establishing a prima
19 facie case of entitlement to disability benefits. *Rhinehart v. Finch*,
20 438 F.2d 920, 921 (9th Cir. 1971). The claimant meets this burden if he
21 establishes that a physical or mental impairment prevents him from
22 engaging in his previous occupation. The burden then shifts to the
23 Commissioner to show 1) the claimant can perform other substantial
24 gainful activity, and 2) that a "significant number of jobs exist in the
25 national economy" which the claimant can perform. *Kail v. Heckler*, 722
26 F.2d 1496, 1498 (9th Cir. 1984). A claimant is disabled only if his
27 impairments are of such severity that he is not only unable to do his
28 previous work but cannot, considering her age, education, and work

1 experiences, engage in any other substantial gainful work which exists
2 in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

3 **D. Standard of Review**

4 On review, the court considers the record as a whole, not just the
5 evidence supporting the ALJ's decision. *Weetman v. Sullivan*, 877 F.2d
6 20, 22 (9th Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526
7 (9th Cir. 1980)). The court upholds the ALJ's determination that the
8 claimant is not disabled if the ALJ applied the proper legal standards
9 and there is substantial evidence in the record as a whole to support
10 the decision. *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983)
11 (citing 42 U.S.C. § 405(g)); *Browner v. Sec'y of Health & Human Servs.*,
12 839 F.2d 432, 433 (9th Cir. 1987) (recognizing that a decision supported
13 by substantial evidence will be set aside if the proper legal standards
14 were not applied in weighing the evidence and making the decision).
15 Substantial evidence is more than a mere scintilla, *Sorenson v.*
16 *Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975), but less than a
17 preponderance, *McAllister v. Sullivan*, 888 F.2d 599, 601-02 (9th Cir.
18 1989); *Desrosiers v. Sec'y of Health & Human Servs.*, 846 F.2d 573, 576
19 (9th Cir. 1988). "It means such relevant evidence as a reasonable mind
20 might accept as adequate to support a conclusion." *Richardson v.*
21 *Perales*, 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch
22 inferences and conclusions as the [ALJ] may reasonably draw from the
23 evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293
24 (9th Cir. 1965). If the evidence supports more than one rational
25 interpretation, the court must uphold the ALJ's decision. *Allen v.*
26 *Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).

1 **E. Analysis**

2 The Court addresses each of Mr. Howard's challenges to the ALJ's
3 decision.

4 **1. Treating Physicians**

5 Mr. Howard contends that the ALJ failed to properly consider the
6 opinions of his treating physician, Dr. Edward Lane, M.D. ECF No. 13 at
7 11. Dr. Lane treated Mr. Howard from December 2010 to August 2014. Tr.
8 at 1082-84. During this time, Mr. Howard saw Dr. Lane approximately
9 thirty times for a variety of medical issues including hepatitis C
10 treatment, rib pain, stomach pain, back pain, earaches, knee and leg
11 pain, and eating and sleeping trouble, as well as for routine visits
12 such as to get a flu shot. *Id.* It is clear from the medical records that
13 Dr. Lane is Mr. Howard's treating physician.
14

15 In an April 22, 2013 "check-the-box" questionnaire, Dr. Lane
16 indicated that he believed Mr. Howard was incapable "of performing any
17 type of work on a reasonably continuous, sustained basis" Tr. at
18 993. Despite Dr. Lane being Mr. Howard's treating physician, ALJ Payne
19 assigned "little to no weight" to this opinion because it was based
20 solely on "the claimant's self-reports and mild imaging findings." Tr.
21 at 465. Plaintiff disagrees with the characterization that the imaging
22 findings were "mild." Plaintiff points the Court to two records that
23 indicate "disc changes of moderate to marked severity at C4-5 and C5-6
24 and progressive osteoarthritic changes in Mr. Howard's knees." ECF No.
25 13 at 12 (citing Tr. at 974 & 1034). However, the records Plaintiff
26 relies on correspond with examinations conducted on September 23, 2013,
27 and February 25, 2014, well after Dr. Lane filled out his form. Tr. at
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1 974 & 1034. There is no way Dr. Lane would have been able to rely on
2 these examinations in formulating his opinion. The Court finds no fault
3 in the ALJ's characterization of Dr. Lane's April 2013 opinion.

4 On September 30, 2013, Dr. Lane filed out a physical functional
5 evaluation of Mr. Howard. Tr. at 1069. Dr. Lane diagnosed Mr. Howard
6 with degenerative joint disease (DJD) in his knees and COPD. Tr. at
7 1070. Dr. Lane believed that the COPD would limit Mr. Howard's ability
8 to walk at a "moderate" level and the DJD would limit his ability to
9 stand, walk, lift, carry, push, pull, and crouch at a "marked" level.
10 *Id.* This time he indicated that Mr. Howard is limited to performing
11 "sedentary" work. *Id.* Contrary to Plaintiff's assertions, Dr. Lane did
12 not "find" that Mr. Howard suffers from bipolar/schizophrenic disorder,
13 hepatitis C, or sleep apnea during this evaluation. See ECF No. 13 at
14 12. Dr. Lane simply noted that Mr. Howard subjectively complained of
15 these issues. Tr. at 1070. The Court does acknowledge that other parts
16 of the medical record indicate that Mr. Howard has these impairments.
17 ALJ Payne again assigned "little weight" to Dr. Lane's September 2013
18 opinion because it was contradicted by the record. Tr. at 466. ALJ Payne
19 first points out that Mr. Howard "never claimed COPD as a disabling
20 impairment and the record does not show any significant symptoms for
21 treatment for this condition." *Id.* Second, ALJ Payne noted that from
22 June 2013 to February 2014 that Mr. Howard did not report any knee pain.
23 *Id.* In response, Plaintiff argues that COPD is well established in Mr.
24 Howard's medical records and that the lapse in complaints does not
25 render Dr. Lane's opinions less credible. ECF No. 13 at 13.
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1 ALJ Payne instead chose to rely on the findings of Dr. Naga
2 Cheppali, M.D., Dr. Chaugle Shabnam, M.D., and Dr. Robert Thompson. Tr.
3 at 466-67. Dr. Cheppali examined Mr. Howard in February 2014. Tr. at
4 1015-35. Mr. Howard reported to Dr. Cheppali that he was experiencing
5 knee pain when he was sitting or going up and down stairs but he didn't
6 experience much pain while he was walking. Tr. at 1015. Dr. Cheppali
7 examined Mr. Howard and found normal knee alignment, normal skin and
8 soft tissues, and no effusion. Tr. at 1016. Dr. Cheppali noted that Mr.
9 Howard responded well to injections in the past and recommended another
10 trial round of hyaluronic acid injections. *Id.* Mr. Howard saw Dr.
11 Cheppali multiple times between March and May 2014 for the prescribed
12 injections. Tr. at 1017-32. Mr. Howard notes that the injections seemed
13 to help some. Tr. at 1021.

15 Dr. Shabnam examined Mr. Howard in September 2014. Tr. at 1113-16.
16 Mr. Howard complained to Dr. Shabnam of leg pain particularly in the
17 knee. Tr. at 1113. Dr. Shabnam attributed this pain to varicose veins
18 and ordered an ultrasound to evaluate for valvular incompetency. Tr. at
19 1115-6. Dr. Shabnam instructed Mr. Howard to come back after the
20 ultrasound for a follow-up appointment. *Id.* There is no record of this
21 follow-up appointment in the medical history provided to the Court.

23 Dr. Thompson was a non-examining medical expert who reviewed Mr.
24 Howard's medical records and testified before ALJ Payne on January 5,
25 2015. Tr. at 540. Dr. Thompson acknowledged the arthritis in Mr.
26 Howard's knee but did not agree with Dr. Lane's assessment of the
27 functional limitations that accompanied the diagnosis. Tr. at 541.
28 According to the evidence, Dr. Thompson believes that Mr. Howard should

1 be able to lift up to 10 pounds frequently and between 20 and 50 pounds
2 occasionally, but he would warn against ever lifting more than 50 pounds
3 due to the arthritic knee. *Id.*

4 "In disability benefits cases, physicians may render medical,
5 clinical opinions, or they may render opinions on the ultimate issue of
6 disability—the claimant's ability to perform work." *Garrison v. Colvin*,
7 759 F.3d 995, 1012 (9th Cir. 2014) (quotation omitted). There are three
8 types of physicians: treating physicians, examining physicians, and
9 nonexamining physicians. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
10 1995). "As a general rule, more weight should be given to the opinion of
11 a treating source than to the opinion of doctors who do not treat the
12 claimant." *Id.* The ALJ must provide "clear and convincing" reasons for
13 rejecting an examining physician's opinions and may not reject such
14 opinions without providing "specific and legitimate reasons" supported
15 by "substantial evidence" in the record for so doing. *Id.* "An ALJ can
16 satisfy the 'substantial evidence' requirement by setting out a detailed
17 and thorough summary of the facts and conflicting clinical evidence,
18 stating his interpretation thereof, and making findings." *Garrison*, 759
19 F.3d at 1012 (internal quotations omitted).

22 In this case, Dr. Lane was a treating physician and his opinion
23 would normally be given the greatest weight. However, there were two
24 other treating physicians, Dr. Cheppali and Dr. Shabnam, whose medical
25 records were inconsistent with the opinion of Dr. Lane. Furthermore,
26 there was a nonexamining physician whose testimony as to Mr. Howard's
27 functional limitations were more consistent with their findings. The ALJ
28 evaluated all of these facts and found Dr. Lane's assessment that Mr.

1 Howard could not do any work, or later that he could only do sedentary
2 work, inconsistent with the medical record. Based on all of the evidence
3 in the record, the Court finds that the ALJ gave clear and convincing
4 reasons prior to giving little weight to Dr. Lane's opinion and that he
5 satisfied the substantial evidence requirement by setting out a detailed
6 and thorough summary of the facts and conflicting clinical evidence,
7 stating his interpretation thereof, and making findings. Therefore, the
8 Court finds that the ALJ did not err in assigning little weight to Dr.
9 Lane's opinion.
10

11 **2. Mr. Howard's Severe Impairments**

12 Mr. Howard contends that the ALJ failed to find that he suffered
13 from the severe impairments of diverticulitis/abdominal pain, COPD, and
14 sleep apnea. ECF No. 13 No. 13-14. As previously stated, the ALJ found
15 that Mr. Howard suffered from the following severe impairments:
16 bilateral knee tendinitis/osteoarthritis; left shoulder tendinitis;
17 degenerative disc changes in the cervical, thoracic, and lumbar spine;
18 hepatitis C; obesity; bipolar disorder II; and a history of
19 polysubstance abuse. Tr. at 459-60. However, diverticulitis/abdominal
20 pain, COPD, and sleep apnea were not found to be severe impairments.
21

22 "An impairment or combination of impairments may be found not
23 severe *only if* the evidence establishes a slight abnormality that has no
24 more than a minimal effect on an individual's ability to work." *Webb v.*
25 *Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005) (italics in original). "[A]n
26 ALJ may find that a claimant lacks a medically severe impairment or
27 combination of impairments only when his conclusion is clearly
28 established by medical evidence." *Id.*

1 At the outset, it is important to note that Mr. Howard filled out
2 many disability reports during his social security application process
3 and none list any of these three alleged impairments. Tr. at 171, 188,
4 201, & 821. All of the disability reports claim impairments relating to
5 knee, back, and neck pain, and some mental health issues. *Id.*
6 Respiratory issues, abdominal pain, and sleep apnea were not alleged.
7 *Id.* Even during Mr. Howard's January 5, 2015 testimony before the ALJ,
8 he did not complain of abdominal pain, COPD, or sleep apnea. His
9 repeated complaints related to knee, back, and neck pain. See Tr. 548-
10 64.
11

12 Nonetheless, the ALJ considered these issues in his opinion. In
13 regards to Mr. Howard's abdominal pain, the ALJ noted that Mr. Howard
14 began complaining of abdominal pain and was prescribed an acid reducer.
15 Tr. at 461. The ALJ pointed out that Mr. Howard's abdominal CT came back
16 normal and concluded that the evidence was not sufficient to show that
17 the impairment lasted more than 12 months. *Id.* In fact, none of the
18 medical experts the Court considered listed any functional limitation
19 resulting from stomach pain. See Tr. at 546, 1070. Even Mr. Howard's
20 preferred medical expert, Dr. Lane, did not list abdominal pain on
21 either of his questionnaires as a limiting impairment. Tr. at 993, 1070.
22 The Plaintiff is correct that there is some evidence in the medical
23 record to show that Mr. Howard has suffered from abdominal pain in the
24 past. Tr. at 841, 850, 942, 965, 1058, 1060, & 1064. However, many of
25 these records relate to short term or temporary complaints. See, e.g.,
26 Tr. at 942. And one physician attributed Mr. Howard's stomach problems
27 to marijuana use. Tr. at 965. Therefore, the Court finds that the
28

1 medical evidence establishes that Mr. Howard's stomach pain is a slight
2 abnormality that has no more than a minimal effect on his ability to
3 work. As a result, the Court finds that the ALJ did not err in not
4 listing diverticulitis or abdominal pain as a severe impairment.

5 As to Mr. Howard's alleged COPD, the ALJ also considered this
6 impairment despite the fact that Mr. Howard never listed it on his
7 disability reports. The only medical expert who listed COPD as a
8 limiting impairment was Dr. Lane who listed it as a "moderate
9 impairment." Tr. at 1070. As previously stated, the ALJ appropriately
10 gave Dr. Lane's opinion little to no weight. Furthermore, the ALJ found
11 that the "evidence does not support" Dr. Lane's opinion that Mr. Howard
12 suffered from COPD given it was never "claimed" as a "disabling
13 impairment" and the "record does not show any significant symptoms or
14 treatment for this condition." Tr. at 466. The Court agrees. While COPD
15 and respiratory issues reoccur throughout Mr. Howard's medical
16 condition, the record does not show that it was a significant complaint
17 of Mr. Howard's or that Mr. Howard received treatment for the
18 impairment. Therefore, the Court finds that the medical evidence
19 establishes that Mr. Howard's COPD is a slight abnormality that has no
20 more than a minimal effect on his ability to work. As a result, the
21 Court finds that the ALJ did not err in not listing COPD as a severe
22 impairment.

23 Finally, as to Mr. Howard's sleep apnea, again, Mr. Howard did not
24 list sleep apnea on his disability report. This time, however, the ALJ
25 did not consider whether Mr. Howard's alleged sleep apnea was a severe
26 impairment in his opinion. This is immaterial in this case. The medical
27
28

1 evidence is not sufficient to prove that Mr. Howard's sleep apnea is a
2 severe impairment. In the medical records provided by Dr. Lane, Mr.
3 Howard's primary care provider, there is only one notation indicating
4 the existence of sleep apnea. Tr. at 1084. In May 2011, Dr. Lane noted
5 that Mr. Howard visited for "sleep apnea concerns." Tr. at 1084. After
6 that, sleep apnea was not mentioned in Dr. Lane's records as a reason
7 for a visit. Finally, it is noteworthy that Dr. Lane did not list sleep
8 apnea as an impairment on his physical function report dated submitted
9 in 2013. Tr. at 1070. Therefore, the Court finds that the medical
10 evidence establishes that Mr. Howard's sleep apnea is a slight
11 abnormality that has no more than a minimal effect on his ability to
12 work. As a result, the Court finds that the ALJ did not err in not
13 listing sleep apnea as a severe impairment.

14
15 Based on all of the medical evidence, the Court finds that the ALJ
16 did not err in not listing diverticulitis/abdominal pain, COPD, and
17 sleep apnea as severe impairments.

18 **3. Mr. Howard's Subjective Complaints**

19
20 Mr. Howard argues the ALJ failed to provide valid reasons for
21 considering his testimony regarding the severity and limiting effects of
22 his impairments as less than credible.

23 A two-step analysis is used by the ALJ to assess whether a
24 claimant's testimony regarding subjective pain or symptoms is credible.
25 *Garrison v. Colvin*, 759 F.3d 995, 1014 (9th Cir. 2014). Step one
26 requires the ALJ to determine whether the claimant presented objective
27 medical evidence of an impairment, which could reasonably be expected to
28 produce some degree of the pain or other symptoms alleged. *Lingenfelter*

1 v. *Astrue*, 504 F.3d 1028, 1035–36 (9th Cir. 2007); *Smolen v. Chater*, 80
2 F.3d 1273, 1282 (9th Cir. 1996). Objective medical evidence of the pain
3 or fatigue, or the severity thereof, need not be provided by the
4 claimant. *Garrison*, 759 F.3d at 1014. If the claimant satisfies the
5 first step of this analysis, and there is no evidence of malingering,
6 the ALJ must accept the claimant's testimony about the severity of his
7 symptoms unless the ALJ provides specific, clear, and convincing reasons
8 for rejecting the claimant's symptom-severity testimony. *Id.* An ALJ is
9 not "required to believe every allegation of disabling pain" or other
10 non-exertional impairment. *Orn v. Astrue*, 495 F.3d 625, 635 (9th Cir.
11 2007). However, to discredit a claimant's testimony when a medical
12 impairment has been established, the ALJ must provide specific, cogent
13 reasons for the disbelief. *Id.* Factors that an ALJ may consider in
14 weighing a claimant's credibility include reputation for truthfulness,
15 inconsistencies in testimony or between testimony and conduct, daily
16 activities, and unexplained, or inadequately explained, failure to seek
17 treatment or follow a prescribed course of treatment. *Id.*

19
20 In this case, the ALJ fully documented the testimony of Mr. Howard
21 as to the intensity, persistence, and limiting effects of his
22 impairments. Tr. at 464. The ALJ then found that Mr. Howard's "medically
23 determinable impairments could reasonably be expected to cause the
24 alleged symptoms; however, [his] statements concerning the intensity,
25 persistence and limiting effects of the symptoms are not entirely
26 credible" Tr. at 464. The ALJ then continued on for
27 approximately five pages outlining Mr. Howard's medical history and how
28 it is inconsistent with Mr. Howard's testimony regarding the severity of

1 his symptoms. Tr. at 464-69. The ALJ reviewed the opinions of Dr. Opara
2 and how Dr. Opara believed that Mr. Howard could "stand and/or walk up
3 to six hours, lift and/or carry 10 pounds frequently and 20 pounds
4 occasionally, and he had no postural, manipulative, or environmental
5 limitations." Tr. at 465. The ALJ reviewed the opinion of Dr. Lane and
6 reiterated that it received little weight as it was the only opinion
7 that suggested that Mr. Howard was incapable of working on any sustained
8 level. *Id.* The ALJ reviewed the second opinion of Dr. Opara and how he
9 found no physical limitations based on a physical examination. Tr. at
10 466. The ALJ reviewed the records of Dr. Cheppali who found "no
11 effusion, normal knee alignment, and minimal joint tenderness." The ALJ
12 noted that Dr. Cheppali recommended treatment for which Mr. Howard never
13 returned. *Id.* The ALJ reviewed the records of Dr. Shabnam who diagnosed
14 Mr. Howard's leg pain as varicose veins and advised that Mr. Howard
15 return for symptom management. Tr. at 467. Again there is no record of
16 Mr. Howard returning. *Id.* The ALJ reviewed the opinion of Dr. Thompson
17 and how, based on the entire medical records, Dr. Thompson believed that
18 Mr. Howard was capable frequently lifting 10 pounds and occasionally
19 lifting 20 to 50 pounds. *Id.* Dr. Thompson believed that Mr. Howard could
20 also crouch, kneel, and climb. *Id.*

23 Based on all of this medical evidence, as compared with Mr.
24 Howard's disability reports and testimony regarding the severity,
25 intensity, and limiting effects of his impairments, the ALJ found that
26 Mr. Howard's subjective statements were not credible as they were
27 sufficiently contradicted by the medical evidence. Tr. at 465. This
28 Court agrees and finds that the ALJ provided specific, clear, and

1 convincing reasons for rejecting the claimant's symptom-severity
2 testimony and did not err in finding Mr. Howard's testimony not entirely
3 credible.

4 **4. Specific Jobs in the National Economy**

5 Finally, Mr. Howard contends that the ALJ failed to properly find
6 that there are jobs that exist in significant numbers in the national
7 economy that Mr. Howard can perform. ECF No. 13 at 17-18. Specifically,
8 Mr. Howard argues that the ALJ failed to include the opinions of Dr.
9 Lane in proffering the hypothetical to the VE and that once Plaintiff's
10 counsel did so in his hypothetical, the VE testified that Mr. Howard was
11 incapable of maintaining competitive employment. ECF No. 13 at 17.

12 During the January 9, 2015 hearing, VE Daniel McKinney appeared
13 and testified. Tr. at 565. The ALJ asked the VE:
14

15 Assume an individual who would be in his or her early
16 50's to just shy of mid-50's who has a GED, with
17 average ability to read and write and use numbers.
18 And who has the same past relevant work experience as
19 the claimant in this case. Assume this individual
20 capable of performing work at the following
21 exertional and non-exertional levels. The person
22 would be able to sit two hours, stand two hours, walk
23 six hours in an eight hour day with normal breaks.
24 Lift no more than 20 pounds occasionally, lift or
25 carry 10 pounds frequently. Non-exertionally, there
26 would be occasional crouching, occasional kneeling,
27 no crawling. Occasional ramps or stairs. And
28 occasional ladders, ropes or scaffolds. Those were in
the postural areas. In the environmental area, there
would be occasional unprotected heights. Who also has
the mental limitations for the hypothetical given to
you in the narrative form. Assume the individual can
perform one to step work instructions. This
individual does better with visual instructions
versus verbal instructions only. No interaction with
children but could interact appropriately with most
of the general public. Would do best with occasional
supervision, no over the shoulder type of
supervision. Assume further that the individual has

1 physical and mental symptomatology and that the
2 individual takes prescriptions medication for the
3 symptomatology. However, despite any side effects of
4 the medication, the individual would be able to
5 remain reasonably attentive and responsive in a work
6 setting and would be able to carry out normal work
7 assignments satisfactorily. Considering the
8 hypothetical, could the individual - well, it's clear
9 he couldn't perform past work, is that correct?

10 Tr. at 570-71 (errors included in transcript). The VE responded, "That's
11 correct." Tr. at 571. The ALJ then asked if there were any other jobs in
12 the national economy that the individual could perform. After some
13 clarifying questions, the VE informed the ALJ that there were jobs in
14 the national economy such a person could perform, including Production
15 Assembler 706.687-410, Electronics Worker 726.687.014, and Packing Line
16 Worker 753.687-438. Base on this testimony, the ALJ found that there are
17 jobs that exist in significant numbers in the national economy that Mr.
18 Howard can perform. Tr. at 470-71. Plaintiff believes the hypothetical
19 proffered to the VE was incomplete and, therefore, the ALJ's
20 determination was improper. ECF No. 13 at 17.

21 "If an ALJ finds a severe impairment at step two, that impairment
22 must be considered in the remaining steps of the sequential analysis."
23 *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009).
24 If the hypothetical posed to the vocation expert "does not reflect all
25 the claimant's limitations, we have held that the expert's testimony has
26 no evidentiary value to support a finding that the claimant can perform
27 jobs in the national economy. *DeLorme v. Sullivan*, 924 F.2d 841, 850
28 (9th Cir. 1991). The hypothetical should be based on "accurate,
detailed, and supported by the medical record." *Osenbrock*, 240 F.3d at

1 1165 (quoting *Tackett v. Apfel*, 180 F.3d 1094, 1101 (9th Cir. 1999)).
2 However, it is "proper for an ALJ to limit a hypothetical to those
3 impairments that are supported by substantial evidence in the record."
4 *Id.*

5 Mr. Howard contends that the ALJ erred in formulating the
6 hypothetical because it failed to incorporate Dr. Lane's opinion as to
7 Mr. Howard's functional limitations and Mr. Howard's subjective
8 complaints as to his limitations. As previously discussed, however, Dr.
9 Lane's opinions were properly given little weight by the ALJ because
10 they were contradicted by substantial medical evidence. And Mr. Howard's
11 subjective complaints were properly found to be less than credible
12 because they were contradicted by substantial medical evidence. Finally,
13 Mr. Howard contends that the ALJ erred in not including Dr. Winfrey's
14 opinions as to the functional limitations posed by Mr. Howard's mental
15 health conditions. The ALJ agreed with Dr. Winfrey that "the claimant
16 would have moderate limitations in his social functioning," and
17 limitations as to "concentration, persistence, and pace." Tr. at 462.
18 The Court finds that these issues raised by Dr. Winfrey were
19 sufficiently included in the hypothetical submitted to the VE. For
20 instance, the ALJ included in his hypothetical Plaintiff's limitation to
21 "one to step work instructions," his ability to "interact appropriately
22 with most of the general public," his need for "no over the shoulder
23 type of supervision," his preference for "visual instructions versus
24 verbal instructions only," his ability to "remain reasonably attentive
25 and responsive," and other descriptions of Mr. Howard's mental
26 functional capacity. Tr. at 570-71.
27
28

1 Based on a review of the entire medical record, the Court finds
2 that the hypothetical was "accurate, detailed, and supported by the
3 medical record" but only included those impairments that were "supported
4 by substantial evidence in the record." *Osenbrock*, 240 F.3d at 1165.
5 Therefore, the ALJ did not err in formulating the hypothetical or
6 finding that Mr. Howard is not disabled under the Social Security Act.

7 **C. Conclusion**

8 For the above-given reasons, the Court denies Plaintiff's Motion
9 for Summary Judgment and grants Defendant's Motion for Summary Judgment.
10

11 Accordingly, **IT IS HEREBY ORDERED:**

- 12 1. Mr. Howard's Motion for Summary Judgment, **ECF No. 13**, is
13 **DENIED.**
- 14 2. The Commissioner's Motion for Summary Judgment, **ECF No. 15**,
15 is **GRANTED.**
- 16 3. The Clerk's Office is to enter **Judgment** in favor of the
17 Commissioner.
- 18 4. The case shall be **CLOSED.**

19 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this
20 Order and provide copies to all counsel.
21

22 **DATED** this 17th day of February 2016.

23
24 _____s/Edward F. Shea_____
25 EDWARD F. SHEA
26 Senior United States District Judge
27
28